

**UNITED STATE OF AMERICA  
BEFOR THE NATIONAL LABOR RELATIONS BOARD  
REGION 10**

GOLDEN STATE FOODS

Employer

And

Case 10-RC-267373

BAKERY, CONFECTIONARY, TOBACCO  
WORKERS AND GRAIN MILLERS UNION  
LOCAL 42

Petitioner

**REQUEST FOR BOARD REVIEW OF ACTING REGIONAL DIRECTOR'S  
ORDER FOR MAIL BALLOT ELECTION**

COMES NOW Golden State Foods ("GSF"), pursuant to Section 102.67 of the National Labor Relation Board's ("NLRB" or "Board") Rules and Regulations, and respectfully submits this Request for Review of the Regional Director's Decision and Direction of a Mail-Ballot Election, dated November 25, 2020 (hereafter the "Order"), currently scheduled to begin on December 14, 2020.

Please note GSF is concurrently filing an Emergency Motion to Stay the Election with supporting facts and legal arguments contained therein.

**INTRODUCTION**

The Acting Regional Director's Order is an abuse of discretion. While it is true that regional directors have discretion in deciding whether a representation election is held manually or by mail ballot, a Regional Director, as outlined in the Board's recent decision in *Aspirus Keweenaw*, 370 NLRB No 45 (November 9, 2020) and precedent established by *San Diego Gas & Electric*, 325 NLRB 1143 (1998), is not empowered to ignore the undisputed record evidence showing that in-person election could be held safely and consistent with Board standards.

In short, the Acting Regional Director abused her discretion by disregarding the five remaining factors from the Board's *Aspirus Keweenaw* framework and ordering a mail ballot election based solely on a positivity rate barely above the 5% threshold. To let the ARD's decision stand would undermine the stature and purpose of the National Labor Relations Board.

For these reasons, GSF respectfully requests the Board to grant its Request for Review pursuant to Section 102.67(d)(1)-(4) of the Board's Rules and Regulations.

### **FACTUAL BACKGROUND**

#### **I. GSF HAS PRESENTED A WEALTH OF UNDISPUTED AND COMPELLING EVIDENCE SHOWING THE BOARD'S PREFERENCE FOR A MANUAL ELECTION SHOULD BE HONORED HERE.**

A pre-election hearing in this matter was held on October 23, 2020. The sole issue discussed was whether the representative election should be held manually or by mail ballot. Tr., 15:16-24.

At the hearing, GSF presented the testimony of Dr. Wayne Morgan, the Corporate Vice President and President of the Protein Products Group for GSF's Opelika operation, and Nathan Murphy, the Vice President of Operations for the Protein Group for Golden State. Dr. Morgan described the extensive safety protocols GSF has introduced and enforced since April to prevent the transmission of COVID-19 at GSF's Opelika plant (*see* Tr., 18-30), testified that GSF's COVID-19 safety protocols have effectively prevented the spread of COVID-19 on Golden State's plant, and explained GSF's proposed manual election safety protocols and voting process which not only comply with but exceed the suggested manual election protocols set forth in GC Memo 20-10. Exhibit 1; Tr., 34-45. Further, Dr. Morgan narrated a power point walkthrough of the proposed voting area showing GSF's proposed election safety protocols. Tr., 39-45. Dr. Morgan's testimony was uncontroverted.

At the time of the hearing and later as of GSF's submission of its brief in response to the Show Cause Order, the positivity rate in Lee County, where GSF's plant is located was below 5%. Tr. At 32-33; and GSF Brief. The ARD's review of relevant Alabama data showed that the rate was 5.75% for the fourteen-day period of November 1-15, 2020. See Decision and Direction of Elections. In *Aspirus Keweenaw*, the Board directed that the relevant period for the ARD's to review was 14 days before the Decision and Direction, here November 10-24. The ARD did not utilize that data and failed to abide by the Board's framework. Regardless, GSF showed that an in-person election could be held safely and securely.

## **II. THE UNION HAS AGREED TO AN IN-PERSON ELECTION.**

After it filed its Representation Petition, the Union and GSF agreed to a proposed stipulated in person election. The ARD nevertheless ordered an evidentiary hearing to evaluate the safety protocols for the vote. Again, the Union did not contest the employer's evidence and even stipulated that it would waive any time period required for having in hand the voter eligibility list should the ARD order an in-person election. Tr. 89.

## **ARGUMENT**

## **III. LEGAL STANDARD FOR GRANTING REVIEW.**

Section 102.67(d) of the Board's Rules and Regulations provides that the "Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:"

- (1) That a substantial question of law or policy is raised because of:
  - (i) The absence of; or
  - (ii) A departure from, officially reported Board precedent.

- (2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
- (3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
- (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

Here, the Acting Regional Director abused her discretion by rejecting and ignoring the evidence that GSF presented that an in-person election could be conducted safely and that a positivity rates just above the 5% threshold should not be the sole basis for a mail ballot election. The Acting Regional Director's abuse of discretion is severe enough to satisfy all four grounds for review. Accordingly, the Board should grant GSF's Request for Review.

#### **IV. REVIEW IS APPROPRIATE BECAUSE THIS ELECTION PRESENTS COMPELLING REASONS FOR THE BOARD TO FURTHER ADDRESS ITS POLICY ON MANUAL ELECTIONS DURING THE COVID-19 PANDEMIC.**

There are compelling reasons to grant review of the Acting Regional Director's Order and grant GSF's concurrently filed Emergency Motion to Stay, because this case presents the ideal "appropriate proceeding" to address when a manual election, as opposed to a mail-ballot election, is more appropriate during the COVID-19 pandemic, especially where here safety protocols have been detailed and are not disputed.. § 102.67(d)(4). While GSF recognizes the Board recently adopted a framework for this issue, it could not have anticipated the unintended consequences associated with one factor, just barely over the line, trumping the other factors which all overwhelmingly fell in favor of an in-person vote. The compelling reasons for granting review of the Order in this case are simple: the undisputed evidence and uncontroverted testimony establish that GSF's proposed election protocols comply with the suggested protocols in GC Memo 20-10 and will prevent the transmission of COVID-19, and a manual election can be held at GSF's plant

with an almost zero percent chance of transmission. The record evidence shows that the election will be held in a hospital-like setting with extensive COVID-19 prevention protocols which comply with GC 20-10, where the chances of transmission are nearly zero and where there is no known on-premises transmission. If a manual election is not appropriate under these circumstances, then the Board needs to explain why. If there is ever a case for the Board to further scrutinize its framework on mail ballot elections, this is it. Accordingly, there is a compelling reason to grant review under Section 102.67(d)(4).

**V. REVIEW IS APPROPRIATE BECAUSE THE ORDER RAISES A SUBSTANTIAL QUESTION OF LAW RELATED TO THE BOARD'S STRONG PREFERENCE FOR MANUAL ELECTIONS.**

A separate compelling reason exists to grant review because the Order raises a substantial question of law. § 102.67(d)(1). The Order reflects an unreasoned departure from the Board's strong preference for in-person, manual elections over mail-ballot elections. *San Diego Gas and Elec.*, 324 NLRB 1143, 1144 (1998) (expressing preference for manual elections and articulating narrow circumstances when a regional director may properly direct a mail-ballot); and supports a re-working of the recent framework from *Aspirus Keweenaw*. The Board could not have intended the result here.

The Acting Regional Director admits that GSF is willing and able to comply with all requirements of [Memorandum GC 20-10].” Order, p. 5. A 5.75% positivity rate in the county should not be enough to overcome all the indicia contained in the record supporting a safe in-person vote. This is clearly not what the Board in *Aspirus Keweenaw* or *San Diego Gas and Electric* intended and there is no legal support for that position.

**VII. REVIEW IS APPROPRIATE BECAUSE THE ORDER HAS RESULTED IN PREJUDICIAL ERROR TO THE PARTIES.**

The Board should grant review of the Regional Director's Order because the Regional Director's conduct in issuing the decision has resulted in prejudicial error to the Parties and will disenfranchise voters. § 102.67(d)(3). As stated above, GSF and the Petitioner elected to hold a manual election. The ARD Order is based solely on the 5.75% positivity rate in Lee County and it ignores the will of the parties and the Board's preferred method of election. The ARD chose to ignore the parties' preference and GSF's extensive safety protocols and proposed process for holding a safe manual election or the undisputed testimony establishing that a manual election can be held safely with a low chance of COVID-19 transmission. Because no extraordinary circumstances exist, and no other circumstances exist to hold a mail-ballot election under *San Diego Gas and Electric*, the Acting Regional Director's Order represents clear prejudicial error.

**CONCLUSION**

For the foregoing reasons, the Board should grant GSF's Request for Review because the Acting Regional Director abused her discretion in ordering a mail-ballot election rather than an in-person election.

Dated this 30<sup>th</sup> day of November, 2020.

/s/ Jeffrey A. Schwartz  
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ATTORNEYS FOR EMPLOYER

### **CERTIFICATE OF SERVICE**

I hereby certify that on this 30<sup>th</sup> day of November, 2020, a copy of the foregoing document was served via electronic mail and/or by U.S. Mail, postage prepaid, as follows:

*(Sent via NLRB e-filing)*

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